



Virginia
Regulatory
Town Hall

Periodic Review and
Notice of Intended Regulatory Action
Agency Background Document

Agency Name:	Alcoholic Beverage Control Board
VAC Chapter Number:	3 VAC 5, Chapter 20
Regulation Title:	Advertising
Action Title:	Advertising Rule Revisions
Date:	August 1, 2001

This information is required pursuant to the Administrative Process Act § 9-6.14:25, Executive Order Twenty-Five (98), and Executive Order Fifty-Eight (99) which outline procedures for periodic review of regulations of agencies within the executive branch. Each existing regulation is to be reviewed at least once every three years and measured against the specific public health, safety, and welfare goals assigned by agencies during the promulgation process.

This form should be used where the agency is planning to amend or repeal an existing regulation and is required to be submitted to the Registrar of Regulations as a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B).

Summary

Please provide a brief summary of the regulation. There is no need to state each provision; instead give a general description of the regulation and alert the reader to its subject matter and intent.

This chapter sets forth limitations on advertising of alcoholic beverages by manufacturers, distributors, and retailers.

Basis

Please identify the state and/or federal source of legal authority for the regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. Where applicable, explain where the regulation exceeds the minimum requirements of the state and/or federal mandate.

Title 4.1 of the Code of Virginia gives the Alcoholic Beverage Control Board general authority to regulate the manufacture, distribution and sale of alcoholic beverages within the Commonwealth, including the authority to promulgate regulations which it deems necessary to carry out the provisions of Title 4.1, in accordance with the Administrative Process Act. Section 4.1-320 of the Code of Virginia prohibits the advertising of alcoholic beverages except in accordance with Board regulations. While the Code prescribes a few areas in which the Board may not prohibit certain types of advertising, the statutes do not mandate any particular regulations. Therefore, the entire regulation exceeds the statutory minimum.

Public Comment

Please summarize all public comment received as the result of the Notice of Periodic Review published in the Virginia Register and provide the agency response. Where applicable, describe critical issues or particular areas of concern in the regulation. Also please indicate if an informal advisory group was or will be formed for purposes of assisting in the periodic review or development of a proposal.

The Board received comment from five entities involved in the manufacture, distribution, and sale of alcoholic beverages: the Distilled Spirits Council of the United States (DISCUS), a national trade association representing distillers; Guinness UDV, a major beer, wine, and spirits supplier; Miller Brewing Company; the Virginia Hospitality and Travel Association, a trade association representing the hotel and restaurant community; and Associated Distributors, Inc., a beer and wine wholesaler and distilled spirits broker.

DISCUS and Guinness UDV each recommended modifications to 3 VAC 5-20-50, which limits advertising of distilled spirits products to print media and prohibits the broadcast advertising of such products. They argue that, as normally consumed, distilled spirits drinks contain the same amount of alcohol as servings of wine or beer, and the products should be given equal treatment. The Board finds that the public policy concerns which gave rise to the distinctions between spirits advertising and wine and beer advertising have not been considered in recent years, and it proposes to proceed with this proposal through the Notice of Intended Regulatory Action stage to invite further public comment and discussion of the issue.

Miller Brewing Company presented the following 12 proposals:

1. To delete provisions in the current regulation prohibiting the use of athletes or athletic teams in alcoholic beverage advertising. A Notice of Intended Regulatory Action has already been published to address this issue.
2. To allow combination packaging for beer products as it is currently allowed for wine. The Board agrees with this proposal.
3. To remove current restrictions on three dimensional point-of-sale advertising materials and limits on the value of inflatable plastic advertising items. The Board does not intend to proceed with this proposal.
4. To allow manufacturers or wholesalers to provide mechanical and illuminated devices to retailers for display. The Board does not intend to proceed with this proposal.

5. To increase the permissible size of name and logo on service items or advertisements that bear messages related to responsible drinking. The Board intends to propose increasing the permissible size from 10% to 25% of the advertising space.
6. To allow the use of billboard advertising in additional venues. The Board intends to proceed with the addition of amphitheaters primarily used for concerts as permissible locations for billboard advertising.
7. To allow manufacturers or wholesalers to distribute novelty items to consumers on licensed premises and in product packaging. The Board intends to proceed with a proposal to allow novelty items in combination packaging, but not to consumers on licensed premises.
8. To allow manufacturers or wholesalers to provide retailers promotional items for display purposes only during promotion periods, such items to be returned upon completion of the promotion. The Board intends to proceed with the Notice of Intended Regulatory Action stage on this proposal to receive additional public comment.
9. To amend the coupon provisions to eliminate the discrepancies between beer and wine wholesalers. The Board intends to proceed with this proposal.
10. To allow wholesalers to cosponsor all public events. The Board intends to proceed with the Notice of Intended Regulatory Action stage on this proposal to receive additional public comment.
11. To allow manufacturers or wholesalers to donate malt beverages for trade shows and charitable events. The Board does not intend to proceed with this proposal.
12. To allow manufacturers or wholesalers to sponsor charitable events held on licensed premises. The Board does not intend to proceed with this proposal.

The Virginia Hospitality and Travel Association presented five suggestions for changes to the regulation:

1. To repeal the current prohibition against cooperative advertising. The Board does not intend to proceed with this proposal.
2. To allow the use of permanent point-of-sale materials with reference to alcoholic beverage brands, and to allow retailers to obtain such materials from manufacturers or wholesalers. The Board does not intend to proceed with this proposal.
3. To allow manufacturers or wholesalers to provide service items such as placemats, coasters, glasses or bar mats to retailers. The Board does not intend to proceed with this proposal.
4. To increase the value of novelty items which may be provided by manufacturers and wholesalers to retailers and others from \$5 to \$10, and to allow them to be provided to patrons and be displayed at licensed premises. The Board has already published a Notice of Intended Regulatory Action to address the value increase, but it does not intend to proceed with the proposal to allow the giving of such items to patrons or their display on licensed premises.
5. To require the reporting of certain information by sponsors of special events who engage another person to organize, conduct or operate the event. The Board has already published a Notice of Intended Regulatory Action to achieve this result.

Associated Distributors, Inc., submitted two proposals:

1. To allow spirits solicitors to give novelty items to mixed beverage licensees or their customers, to be displayed on the licensed premises and carried away by consumers. The Board does not intend to proceed with this proposal.

2. To allow certain permanent point-of-sale items containing advertising related to spirits to be displayed by mixed beverage licensees, and to allow spirits solicitors to provide such items to retailers. The Board does not intend to proceed with this proposal.

Effectiveness

Please provide a description of the specific and measurable goals of the regulation. Detail the effectiveness of the regulation in achieving such goals and the specific reasons the agency has determined that the regulation is essential to protect the health, safety or welfare of citizens. In addition, please indicate whether the regulation is clearly written and easily understandable by the individuals and entities affected.

The goal of this regulation is:

To promote the public health, safety, and welfare by promoting moderation in alcoholic beverage advertising, while allowing manufacturers, distributors, and retailers a reasonable opportunity to promote their products in the marketplace.

Under Section 4.1-320 of the Code of Virginia, virtually all alcoholic beverage advertising would be illegal in the absence of Board regulation. This result would unreasonably and unconstitutionally restrict the ability of industry members to promote their products. On the other hand, the Board is charged with protecting the health, safety, and welfare of the public by promoting moderation in the consumption of alcoholic beverages. That charge is best met by preventing the over-promotion of such products. Therefore, some regulation striking a balance between these competing interests is essential.

The Board has received no complaints from affected parties with respect to their ability to understand the regulation. In addition, very few illegal advertising violations are discovered. The Board feels that the regulation is clearly written and understandable.

Alternatives

Please describe the specific alternatives for achieving the purpose of the existing regulation that have been considered as a part of the periodic review process. This description should include an explanation of why such alternatives were rejected and this regulation reflects the least burdensome alternative available for achieving the purpose of the regulation.

Alternatives considered but rejected include repeal of the regulation in its entirety or the passage of a regulation permitting all truthful advertising. A repeal of the regulation in its entirety would result in virtually all alcoholic beverage advertising being banned under the Code of Virginia, a result that would not be fair to the regulated industry or constitutional under several opinions of the U. S. Supreme Court. A totally permissive regulation would abandon the Board's responsibility to promote the public health, safety, and welfare by promoting moderation, as well as fail to maintain the reasonable separation of the manufacturing and retail interests, as required by the Code of Virginia. The Board feels that the least burdensome way of meeting the purpose

of the regulation is to strike a balance between the reasonable efforts of those in the alcoholic beverage industry to promote their products and the dangers to temperance from over-promotion.

Recommendation

Please state whether the agency is recommending the regulation be amended or terminated and the reasons such a recommendation is being made.

The Alcoholic Beverage Control Board recommends that the regulation be amended as indicated in its responses to the public comment, in order to update several provisions which have not been revised for several years. The suggested amendments would allow industry members more flexibility in product promotion, while maintaining a moderate approach and an appropriate separation of the manufacturing and retail sectors.

Substance

Please detail any changes that would be implemented.

In addition to those changes for which the Board has previously submitted Notices of Intended Regulatory Action, the following changes would be implemented:

In 3 VAC 5-20-10, subsection E8, delete "for wine".

In 3 VAC 5-20-20, subsection B4e, replace "10%" with "25% "

In 3 VAC 5-20-30, subsection 3, add "amphitheaters" to the list of venues where billboard advertising is permitted, and add "concerts or" after "for " in that subsection.

In 3 VAC 5-20-40, subsection B5, replace "10%" with "25%".

In 3 VAC 5-20-50, subsection B, delete "but less than 22% alcohol".

In 3 VAC 5-20-60, add a provision allowing manufacturers or wholesalers to provide promotional items to retailers which must be returned upon completion of the promotion period.

In 3 VAC 5-20-90, subsection B1, remove the distinction between what tasks may be performed by wine and beer wholesalers.

In 3 VAC 5-20-100, subsection B9, replace "charitable" with "public".

Family Impact Statement

Please provide a preliminary analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The Board does not expect the proposed regulatory action to have an impact on the institution of the family or family stability.